

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 16994 / 2005
Date of judgment: 06/11/2007

UNREPORTABLE

In the matter between:

LONE CREEK RIVER LODGE (PTY) LTD
JOHANITA MAGDALOUISE HENNING
LIEZL EDITH HARTMAN

1ST APPLICANT
2ND APPLICANT
3RD APPLICANT

And

GLOBAL FOREST PRODUCTS (PTY) LTD

1ST RESPONDENT

GLOBAL FOREST PRODUCTS HOLDINGS (PTY) LTD

2ND RESPONDENT

SOUTH AFRICAN PLYWOOD (PTY) LTD

3RD RESPONDENT

GLOBAL SAWMILLS (PTY) LTD

4TH RESPONDENT

PROVINCIAL HEAD OF DEPARTMENT,
DIRECTORATE ENVIRONMENTAL AFFAIRS
MPUMALANGA DEPARTMENT OF
AGRICULTURE AND LAND ADMINISTRATION

5TH RESPONDENT

THE MINISTER: ENVIRONMENT AFFAIRS
AND TOURISM, NATIONAL GOVERNMENT

6TH RESPONDENT

MEC OF AGRICULTURE, CONSERVATION
ENVIRONMENT AND LAND ADMINISTRATION
OF THE MPUMALANGA PROVINCE

7TH RESPONDENT

THABA CHWEU MUNICIPALITY

8TH RESPONDENT

THE MINISTER OF HEALTH, NATIONAL
GOVERNMENT

9TH RESPONDENT

JUDGMENT

DU PLESSIS J:

The town of Sabie is situated on the scenic Drakensberg escarpment. Tourists are attracted to the area, not only by its natural beauty, but also by a variety of places of geological and historical interest. In addition, the area is well situated as a stop over *en route* to the Lowveld with its well-known Kruger National Park. In sum, Sabie's value for the maintenance and development of tourist accommodation cannot be doubted.

The area around Sabie also hosts many timber plantations that support vibrant woodcutting, wood-milling and related industries. As is often, if not always, the case in such areas, the tourism and timber industries must coexist in the Sabie area. This case concerns that coexistence.

Driving westward along Sabie's Main Street, the street becomes the Old Lydenburg Road that leads to the Lone Creek Waterfall and to other tourist attractions. The Lone Creek River Lodge, a luxurious guesthouse, is situated a couple of kilometres west of Sabie. The Lodge straddles the Old Lydenburg Road in that, to the north of the road, are its main buildings with a number of guest rooms, its chapel and its conference facilities. To the south of the Old

Lydenburg Road there are wooden self-catering cottages. The cottages face the road and are about 20 metres away from it.

About 700 metres to the west of the Lodge, on the northern side of the Old Lydenburg Road, are the Sabie sawmill and, on the same premises, a plywood plant. The mill is one of the biggest and the plywood plant is the biggest of its kind in South Africa.

By their very nature, sawmills and plywood plants gulp wood in vast quantities. Heavy trucks transport wood from timber plantations to the Sabie sawmill and the plywood plant. Even heavier trucks transport finished products from the mill and the plant to the markets. The Old Lydenburg Road is the only tarred road leading to the mill and the plant. On their way to and from the mill and the plant, these trucks pass, as they have to, the Lodge. The noise of the trucks disturbs the guests staying at the Lodge, especially at night. The potential for conflict is, I think, self evident.

The applicants, directly and indirectly, own the Lodge. The first to fourth respondents, related companies, directly and indirectly, own the sawmill and the plywood plant. The applicants seek an interdict restraining the first to fourth respondents from causing noise pollution generated by their business operations and by vehicles travelling to and from the mill and the plant. It is convenient collectively to refer to the first to fourth respondents as "Global".

Initially, the applicants, contending that Global is guilty of a variety of unlawful acts causing harm to the environment, sought further restraining and mandatory interdicts. The parties have managed to settle their differences in that regard and counsel have handed to the court a draft order that embodies the settlement. The only remaining issues are the one concerning the alleged noise pollution and the issue of costs.

Turning to the noise issue, the relevant facts are briefly the following. A company called Acme Timber Industries established the Sabie sawmill in 1959. In 1972 Acme built the plywood plant. The mill always was a big one with a substantial log intake: in 1973 the mill's log intake peaked at 370 000m³. At that stage the log input to the plant was, at 6900m³, not significant. In 1983 Mondi Timbers Ltd became the owners of the mill and the plywood plant. In that year the log input to the mill reached a second peak but, at 330 000m³, the peak was lower than that of 1973. The input to the plant was still relatively low at 19875m³.

The applicants bought the land on which the Lodge now is in 1996. At the time there was a "run down holiday resort" on the portion to the north of the Old Lydenburg Road. In accordance with their intention to establish a luxury guesthouse, the applicants refurbished the existing buildings on the property and in March 1997 the Lodge opened for business.

The applicants contend that, at about the same time, the mill and the plant became unprofitable or less profitable with the result that Mondi, from about 1997 scaled down the activities at the mill and the plant. This led, the applicants further contend, to a substantially lower log input to the premises. According to the applicants all of this resulted therein that noise pollution, especially caused by trucks to and from the premises, did not pose a problem at the Lodge. The respondents only admit that Mondi's continued presence at the mill and the plant came into question between 1997 and 2000. As to alleged noise pollution in general and as to the contention that log input decreased from about 1997, Global instructed a concern called Arup Transport Planning to conduct a survey of truck movement to and from Global's premises. Arup also compiled tables of historical log input to the mill and the plant. Mr Grobler for Global handed in during argument a useful summary of the historical log input figures as they appear from Arup's report. I shall return to these figures in due course.

In September 1999 the applicants applied for and were later granted a loan to extend and further upgrade the Lodge. Work in that regard commenced in February 2000. The work included the building of wooden self-catering cottages on the southern side of the Old Lydenburg Road. The applicants' purpose was to establish the Lodge as a five star boutique hotel catering for international and domestic markets. The work was completed in September 2001.

Also in 2000, Global purchased the sawmill and the plant from Mondi. There is a dispute of fact as to whether Global has substantially expanded operations at the mill and the plant. What is clear, however, is that Global purchased the enterprise with the intention of investing substantial amounts of money in it. It is also clear that the applicants have since the end of 2001 been receiving complaints from guests about the noise of heavy-laden trucks that pass the Lodge. In particular, guests have been complaining that trucks passing the lodge during the night disturb their sleep, especially the sleep of guests in the self-catering cottages. The applicants have also adduced evidence that several public meetings were held in Sabie during 2001 and 2002 to discuss the noise caused by timber trucks and the effect thereof on tourism.

The applicants complained to Global about the noise that trucks to and from its premises cause, but the parties have been unable to resolve the issue. In 2004 the applicants instructed an expert on noise pollution, Mr Liebenberg, to evaluate the noise levels experienced at the Lodge. Liebenberg found "the road noise levels experienced at the Lone Creek River lodge and in particular at the cottages to be unacceptably high. It was difficult to enjoy uninterrupted sleep and when awakened it was difficult to fall asleep again because of the large numbers of noisy vehicles".

The application was launched in May 2005. In response to the alleged noise pollution, and particularly to Liebenberg's report, Global instructed their

own expert, Mr Malherbe, to do a similar evaluation. Although Malherbe doubts Liebenberg's expertise and the appropriateness of the criteria he used, there is no doubt that, in layman's terms, Malherbe also found that trucks passing the self-catering cottages at night cause a significant disturbance.

Mr Mullins for the applicants sought on their behalf a two-pronged interdict. In the first place, he argued for an order prohibiting Global from allowing any trucks in and out of its premises on weekdays between 18h00 and 08h00 and from allowing any such trucks at any time over weekends and on public holidays. In the second place counsel argued for a more general order to compel Global to limit "any noise generated by the business operations of the Sabie Sawmill and Plywood Plant".

The last, general, part of the interdict may be dealt with immediately. It is in my view, too general in its terms. It amounts to no more than an order prohibiting Global from acting unlawfully. Such a wide, unspecific order cannot be granted, *inter alia* because it does not adequately inform Global what it must refrain from doing. By the same token, such a wide order will be unenforceable as it will be practically impossible to prove that Global has knowingly breached the order. Moreover, although there are allegations on the papers that the equipment at the mill and the plant cause noise, that evidence is not specific so as to enable the court to determine what it is that Global must do to avoid the noise. The interdict in general terms will therefore not be granted.

That brings me to the interdict aimed at curbing truck noise. The applicants have a clear right to use and enjoy their property and to do their business as a guesthouse free from unlawful interference by others. More in particular, the applicants have a clear right to go about their business without the interference of noise unreasonably caused by Global. This is a trite principle of our common law that is enshrined in section 24 of The Constitution of the Republic of South Africa, 1996 that protects the right "to an environment that is not harmful to ... health or well-being". The right is echoed in section 28(1) read with the definition of *pollution* in section 1 of the National Environmental Management Act, 107 of 1998.

In the answering affidavit Global points out that the trucks that cause the noise use a public road. The fact that the trucks use a public road, as they are entitled to do, is a factor that will play a role when deciding whether Global is, *vis a-vis* the applicants, acting lawfully. It is irrelevant, however, in the context of whether the applicants have a clear right to restrain noise that unlawfully infringes their rights. Put differently, a person lawfully using a public road could nevertheless unlawfully cause excessive noise.

I have in the summary of the facts alluded to a dispute as to whether Global has since 2000 materially expanded operations at the mill and the plant. That dispute is relevant to an argument on Global's behalf that the applicants,

especially when they built the cottages, "came to the noise" that had been there before the cottages were built. I did not understand Mr Grobler for Global to submit that, if the applicants came to the noise, they would not have a right to restrain noise unlawfully caused. The existing situation in which the applicants expanded the Lodge and built the cottages will play a role in determining the lawfulness or otherwise of Global's conduct. There is, however, no basis for holding that the applicants are non-suited because they voluntarily accepted harm caused by unreasonable noise. Put differently, on the facts the principle of *volenti non fit iniuria* does not find application and was not submitted to find application.

The applicants can only restrain unlawful conduct on Global's part. Global's conduct will be unlawful if the noise they cause is, viewed objectively, unreasonable having regard to all the circumstances (**Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (AD)**). I shall now proceed to consider whether Global is acting unlawfully.

I have pointed out that both the experts, Liebenberg and Malherbe, concluded that the ambient noise levels experienced at the Lodge, and at the cottages in particular are, by both local and international standards, too high at night. There is no doubt that, subjectively, the second and third applicants who live at the Lodge find the trucks' noise disturbing, especially at night. The applicants' undisputed evidence is that, since the end of 2001, guests, especially

guests staying in the cottages, have been complaining that the noise disturbs their sleep at night. The mere fact that the noise of the trucks cause sleep disturbance is, however, only one aspect of all the circumstances that the court must have regard to when considering whether Global is acting unlawfully.

For Global Mr Grobler submitted that the noise disturbance that the applicants experience is not a function of Global expanding operations. It rather is, he argued, a function of a poor business decision to expand the Lodge and establish a boutique hotel next to a busy sawmill and plywood plant. In particular, counsel submitted, the applicants have themselves to blame for their predicament by constructing wooden guest cottages close to a busy public road and by failing adequately to insulate them against noise. The latter submission is based on Malherbe's evidence that does show that the cottages are by no means sound proof.

The historical log input figures appearing from the Arup report constitute a useful yardstick by which truck movement to and from the mill and the plant may be measured. I annex hereto, marked "A", a copy of the summary of those historical figures that counsel handed to me. The cold figures of the summary show that the input of logs to the mill and the plant showed a downward trend from 1982 to 1996. In 1996, when the applicants bought the land, the input was at its lowest level¹ since 1963². Compared to 1996, log input increased in 1997³

¹ 2270300 m³

² 230 000 m³

when the Lodge opened for business, but the 1997 peak was much lower than earlier peaks in 1992⁴, 1983⁵ and 1973⁶. In 1999, when the applicants applied for a loan to upgrade the Lodge, the log input⁷ was lower than in 1997. As a general proposition, log input between 1995 and 2001 fluctuated at its lowest levels since 1963. From 2001, after Global had taken over the mill and the plant, until 2005, when the application was launched, the log input figures show a sharp upward trend with the 2005 figure⁸ being the highest ever. I summarise: Global's own figures support the applicants' contention that log input to, and thus truck movement to and from, the mill and the plant increased substantially since Global took over the mill and the plant. While the figures show a lull in activities before Global took over, the figures do not bear out Mr Mullins's contention that, when the applicants refurbished the Lodge during the period 1999 to 2001, the mill and the plant were "moribund". At the time, the log input to the mill and the plant was still substantial. Having regard to the pattern of log input since 1997, the applicants' evidence that they have since about the end of 2001 been experiencing increased noise pollution is probable and can therefore be accepted. The increased log input translates into increased truck movement past the Lodge. There is on the evidence no doubt that by far the majority of trucks moving past the Lodge are related to Global's activities. I conclude that the

³ 2920240 m³

⁴ 323 120 m³

⁵ 349 875 m³

⁶ 376 900 m³

⁷ 276 240 m³

⁸ 382 050 m³

disturbing noise levels that the applicants experience are caused by Global's activities.

With reference to counsel's submission that the noise levels that the applicants experience are the result of a poor business decision, I cannot agree entirely. There was a lull in truck movement to and from the mill and the plant when the applicants decided to establish the Lodge as a boutique hotel and to build the cottages. At the time, the applicants thought that truck movement to and from the mill would decrease. With the benefit of hindsight, the decision to upgrade the Lodge might not seem prudent, but it cannot, in the light of the circumstances prevailing at the time, be said to have been an unreasonable decision. One can, however, with justification criticise the applicants for building wooden chalets without adequate noise insulation 20 metres from a public road.

To an extent, therefore, the applicants did "come to the noise". While that is a factor that must be taken into account, the mere fact that the applicants came to the noise does not mean that they cannot restrain Global from causing unreasonable noise (See for instance, *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras. 26 to 28). Moreover, the noise to which the applicants came was less than the noise they now complain of. While the location and poor insulation of the applicants' wooden cottages certainly contribute to the levels at which noise is experienced there, the root of the noise remain trucks on the Old Lydenburg Road.

The parties' respective businesses are located in an area where the potentially conflicting tourist and saw milling industries must coexist. In such a situation reasonableness requires of both parties to give and take. For Global to continue truck movement to and from its premises for 24 hours per day is unreasonable in the circumstances. That is particularly true if regard is had thereto that the noise levels experienced at the Lodge and the cottages threaten the continued existence of the applicants' business while, on the other hand, Global did not adduce evidence that restraining truck movement at night will have a significantly negative impact on its business. While the noise levels might well be less at the cottages if they were properly insulated, the evidence does not show that such a measure would resolve the problem. I conclude that reasonableness dictates that movement of trucks past the Lodge during the night must be restrained and I now proceed to consider the times during which such movement must be restrained.

Mr Mullins submitted that on weekdays the restriction should apply from 18h00. Counsel for both the parties accepted that the practical way of restraining truck movement to and from Global's premises is to restrain Global from allowing trucks to enter or leave its premises. In order for trucks to reach the gates at 18h00, they will have to leave plantations, or wherever they come from, much earlier. In view thereof a restraint as from 18h00 on weekdays will be unduly invasive of Global's rights. If the gate closes at 20h00 on weekdays, it will in my

view afford trucks going to the premises sufficient time to travel there after a full days loading. I accept that guests at the Lodge will probably require silence earlier, but it is not unreasonable to expect of the applicants to take measures to lower noise levels until 20h00 on weekdays. In any event, if the gates close at 20h00, truck movement will probably start to abate earlier. As for the opening time, one must bear in mind that truck movement past the Lodge to Global's premises will probably start an hour or so before the gates are opened. For that reason I deem it reasonable to allow the gates to be opened at 08h00.

Regarding weekends, the interdict must in my view be structured so that the applicants can utilize the wedding facility at the Lodge at least on Saturday afternoons, when weddings traditionally take place. It is not unreasonable to restrain all movement on Sundays: the applicants and their guests are entitled to one quiet day per week and such a restriction will on the evidence not be unreasonably invasive of Global's rights.

Mr Mullins submitted that movement should also be restrained on public holidays. We have many public holidays in this country and businesses throughout the country open on many if not most public holidays. Balancing the respective rights of the parties, I hold that applying a restraint on public holidays will be unreasonable and will not have due regard thereto that the interdict will apply on Sundays.

Counsel were agreed that any order should only apply to traffic using the Old Lydenburg Road past the Lodge. The order will be structured accordingly.

That brings me to the question of costs. Mr Mullins submitted that, if regard is had to the manner in which Global conducted this case, a special costs order is appropriate. In this regard he made reference to the extremely late filing of Global's supplementary answering affidavit. It is correct that Global filed its supplementary answering affidavit extremely late. I have no basis, however, to hold that it did so in a deliberate effort to prejudice the applicants. As it turned out, the contents of the supplementary affidavit, containing as it did many expert reports on various of the issues that the applicants initially raised, facilitated the settlement of all the issues but two. In my view Global did not, as was contended for, approach the applicants' concerns with disdain. It is apparent from the papers that Global went to much trouble and expense in order for it to meet the applicants' case. While there is no doubt that the applicants are substantially successful and that Global must pay their costs, there is no reason why Global should pay the costs on a special or punitive scale. There was no issue that the costs of two counsel were warranted and that the reasonable costs of the employment of all experts whose evidence is included in the applicants' papers must be allowed.

In the result the following order is made:

1. That the director general of the sixth respondent, in conjunction with the fifth, seventh, eighth and ninth respondents, is directed in terms of sections 28(1), 28(5) and 28(12), read with section 28(4), of the National Environmental Management Act, 107 of 1998, to take the steps listed in subsection 28(4), with a view to compliance by the first to fourth respondents with the following:
 - 1.1. The provisions of the National Environment Management Act, 107 of 1998, and its regulations;
 - 1.2. The requirements of the Atmospheric Pollution Prevention Act, 45 of 1965, and its regulations;
 - 1.3. The provisions of the National Environment Management: Air Quality Act, 39 of 2004, and its regulations;
 - 1.4. The provisions of the Environment Conservation Act, 73 of 1989, and its regulations;
 - 1.5. The provisions of the National Water Act, 36 of 1998, and its regulations;

- 1.6. The provisions of the Hazardous Substances Act, 15 of 1973,
and its regulations; and
 - 1.7. The provisions of the Health Act, 63 of 1977, and its regulations.
 - 1.8. The provisions of the Occupational Health and Safety Act, 85 of
1993, and its regulations.
2. The Director General of the sixth respondent's attention is directed in
particular, and specifically, to the following environmental concerns relating
to possible significant pollution or degradation of the environment in relation
to use of the Sabie Sawmill and Plywood Plant:
 - 2.1. hazardous substances, including formaldehyde, heavy metals
and hydro carbons;
 - 2.2. the emission of soot, dust, smoke, and other substances, into the
air;
 - 2.3. the effect of the use of all boilers, kilns, and other wood drying
processes;

- 2.4. the existence of faecal bacteria, and other bacteria, in the water environment at and adjacent to the premises of the Sabie Sawmill and Plywood Plant;
 - 2.5. the spillage of sewage into the storm water system at the Sabie Sawmill and Plywood Plant;
 - 2.6. the prevalence of high levels of total suspended solids, low pH, high iron, phenols and hydro carbons in the water environment at and adjacent to the Sabie Sawmill and Plywood Plant;
 - 2.7. the pollution of the Sabie river through various pollutants originating from the Sabie Sawmill and plywood plant;
 - 2.8. waste disposal emanating from the Sabie Sawmill and Plywood Plant;
 - 2.9. noise caused by the business operations of first to fourth respondents at the Sabie Sawmill and Plywood Plant.
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3. Interdicting the first, second, third and fourth respondents from causing noise pollution generated by vehicles travelling to and from the Sabie Sawmill and Plywood Plant as follows:



- 3.1. by prohibiting first to fourth respondents to allow any trucks in and out of the property where the Sabie Sawmill and Plywood Plant is situated during the hours 20:00 pm to 08:00 am, from Mondays to Fridays, and prohibiting any trucks to enter and leave the said property after 14:00 pm on Saturdays until 08:00 am on Mondays;
 - 3.2. this interdict shall only apply to trucks that have used, before entering the property, or are about to use, after leaving the property, the Old Lydenburg Road past the applicants' property;
 - 3.3. this interdict shall take effect on 1 December 2007.
4. The first to fourth respondents are ordered to pay the applicants' costs of this application including the following:
 - 4.1. The costs of two counsel;
 - 4.2. The reasonable costs of the employment of all experts whose evidence is included in the applicants' papers.

B. R. DU PLESSIS

JUDGE OF THE HIGH COURT

Applicant's attorneys: SAVAGE JOOSTE & ADAMS; REF: A.G.REID/L39

**Respondent's attorneys: WERKSMANS C/O EDELSTEIN - BOSMANN REF:
VDHEEVER/RF/BW001361**

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GLOBAL FOREST PRODUCTS - RESPONSES TO APPLICANT'S REPLYING AFFIDAVIT (ARA)

Andrew Marsay

(Arup report) Table 2 - revised:

Annual input + output volumes, Sabie Sawmill + Plywood Plant, 1959 - 2005

Year	Raw logs input (m ³)	Plywood log input m ³ (figures in bold based on installed capacity)	Total log input m ³	no. of tms in
1959	130,000			
1963	230,000			
1972	360,000	6890	366,890	28 676
1973	370,000	6900	376,900	29 456
1982	300,000	11925	320,700	24 391
1983	330,000	19875	349,875	27 371
1985	300,000	31005	333,120	25 917
1991	237,000	33120	268,120	
1992	290,000	33120	323,120	
1993	246,000	33120	277,120	
1994	266,000	33120	299,120	
1995	218,000	44785	251,120	20 627
1996	179,000	48300	227,300	18 957
1997	226,000	61745	292,240	22 583
1998	197,000	66240	263,240	19 917
1999	210,000	66240	276,240	20 887
2000	218,000	36,984	254,984	18 577
2001	207,000	61745	268,745	17 311
2002	233,000	86920	319,920	20 653
2003	264,000	91425	355,425	22 907
2004	260,000	95135	355,135	22 893
2005	284,000	98050	382,050	24 632

Source: Global Forest Products

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Rw. Day

